IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER,

Appellant,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United
States House of Representatives,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Pursuant to Rule 16 of the Rules of this Court, appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully moves the Court to dismiss the appeal, or in the alternative, to affirm the decision of the three-judge district court on the merits.

OPINION BELOW

The opinion of the three-judge district court, Jurisdictional Statement Appendix (hereafter "J.S. App.") 1a-8a, is not yet reported.

JURISDICTION

The judgment of the district court was entered on October 12, 1976. A notice of appeal (J.S. App. 9a) was filed on October 22, 1976. On December 16, 1976, the Chief Justice extended the time for docketing the appeal to January 20, 1977. The jurisdictional statement was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether appellant, as a sitting Member of Congress, has standing to challenge the statutory scheme adopted by Congress for ascertaining Congressional pay.

2. Whether appellant's challenge to the statutory procedures selected by Congress for determining Congressional compensation raises a nonjusticiable political question.

3. Whether the procedures for setting new rates of compensation for Members of Congress established by Congress in Section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, as an exercise of its powers under the necessary and proper clause (Article I, Section 8), violate Article I, Section 6 (the Ascertainment Clause) or Article I, Section 1 of the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 of the Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 6 of the Constitution provides, in part:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

Article I, Section 8 of the Constitution provides, in pertinent part, that:

> "The Congress shall have Power . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, is set forth at Jurisdictional Statement (hereafter "J.S.") 11a-16a. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31 is set forth in pertinent part at J.S. 3-4.

STATEMENT

The Statutes Involved

The statutes involved in this appeal are Section 225 of the Postal Revenue and Salary Act of 1967[1] ("Salary Act"), and Sections 2 and 3 of the Executive Salary Cost-of-Living Adjustment Act of 1975[2] ("Adjustment Act"), which provide procedures to set new rates of compensation for Members of Congress, federal judges and certain higher officials in the legislative, judicial and executive branch of Government. The Salary Act established a Commission on Executive, Legislative and Judicial Salaries ("the Commission"). Members of the Commission are appointed every fourth fiscal year for a term of office comprising that fiscal year. The Commission is directed to conduct a review of the rates of pay of Members of Congress, federal judges and higher-level positions in the executive, legislative and judicial branches, and submit to the President a report of the results of such review, together with its recommendations as to salaries for such positions.

The President is required to include in the next budget transmitted by him to Congress after the report and recommendations of the Commission are submitted to him, his recommendations with respect to the exact rates of pay he deems advisable for those offices and positions. The statute provides that the recommendations of the President transmitted to Congress in the budget become the effective rates of pay for such offices and positions, effective with the first pay period beginning 30 days after the transmittal of the President's recommendations, to the

[1] 2 U.S.C. §§ 351-361. See also Argument IV.

[2] 2 U.S.C. § 31.

extent that (A) Congress has not enacted into law a statute which establishes different rates of pay, (B) neither House of Congress has enacted legislation which specifically disapproves all or part of such recommendations, or (C) both. The statute further provides that the rates of pay which take effect under this statutory procedure "shall be printed in the statutes at large in the same volume as public laws and shall be printed in the Federal Register and included in the Code of Federal Regulations." 2 U.S.C. § 361.

The Adjustment Act provides a procedure established by statute for an automatic annual cost-of-living adjustment in the salaries of Members of Congress, federal judges and higher-level executive, judicial and legislative officials equal to the average percentage increase in the rates of pay of federal employees covered by the General Schedule being made by the President, pursuant to the standards expressly set forth in Sections 2 and 3 of the Federal Pay Comparability Act of 1970.[3] If, because of national emergency or economic conditions, the President considers it inappropriate to make such pay adjustments, he is directed to prepare and transmit to Congress a plan of alternative recommendations, which may be rejected by either House of Congress.

The Nature of the Case

The appellant brought this action in the district court as a citizen, a taxpayer and a Member of Congress to enjoin the increased salary disbursements to Members of the Congress authorized by the Salary Act and the Adjustment Act. Appellant claimed that the procedure provided by

[3] 5 U.S.C. §§ 5301, 5305-08; See § 5305 (Title 5 U.S.C.).

statute in the Adjustment Act for annual cost-of-living salary adjustments and the procedure provided by statute in the Salary Act for salary adjustments based upon the recommendations of a Commission and the President which were not specifically disapproved by either House of Congress, do not constitute "compensation . . . ascertained by law," as required by Article I, Section 6 of the Constitution, and further that these statutes also violate Article I, Section 1 of the Constitution which provides that all legislative powers ". . . shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant moved for summary judgment and appellees filed cross motions for summary judgment and a motion to dismiss appellant's complaint. The three-judge district court in a memorandum opinion and order (J.S. App. 1a-8a) sustained the constitutionality of the statutes in question, granted summary judgment to appellees and dismissed the complaint (J.S. 2).

With respect to appellant's standing as a citizen, taxpayer and Member of Congress, the district court concluded that appellant had no standing as a citizen or taxpayer to assert his claims, and that as a Member of Congress he suffered no injury under the statutory scheme of the Salary Act in 1974 when a proposed salary increase was vetoed by the Senate, because the status quo was unaltered. (J.S. App. 5a.) However, the district court concluded that the October 1975 salary increase under the Adjustment Act "impaired the efficacy of" appellant's vote because it was effected without action by the House and Senate, and that appellant, therefore, had standing to

challenge not only that Act but also the Salary Act which establishes the procedures for determining the compensation to which the Adjustment Act percentages apply. (J.S. App. 5a.)[4]

ARGUMENT

I. APPELLANT LACKS STANDING TO CHALLENGE THE LEGISLATIVE ENACTMENTS BY WHICH HIS OWN SALARY AND THAT OF HIS FELLOW LEGISLATORS HAVE BEEN INCREASED.

While appellant's jurisdictional statement is silent with respect to his standing to bring this appeal, his standing for that purpose is, nevertheless, a threshold question for consideration by this Court. *Buckley v. Valeo,* 424 U.S. 1, 11 (1976); *Roe v. Wade,* 410 U.S. 113, 125 (1973).

As the district court correctly concluded, appellant lacks standing in his capacity as a citizen and a taxpayer to challenge the legislative enactments by which his own Congressional salary and that of his fellow legislators has been ascertained. *Richardson v. Kennedy,* 401 U.S. 901 (1971), *aff'g,* 313 F. Supp. 1282 (W.D. Pa. 1970).

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[4] The district court opinion is silent on whether there was any injury to appellant under the Adjustment Act in September 1976 as a result of the refusal of the House to appropriate funds for the 1976 cost-of-living pay increase, 122 CONG. REC. H9370-75 (daily ed. Sept. 1, 1976), because the status quo of congressional compensation also was unaltered as a result of that action. If so, it is the use by Congress of its appropriations powers to which the district court referred (J.S. 7a) which is the critical legislative action in determining whether appellant has been injured, and it is to such action that appellant's complaint more properly should be directed.

Appellant also lacks standing to bring this appeal in his capacity as a Congressman. Appellant concedes that adjustments to Congressional salaries under the 1975 Adjustment Act depend entirely on the adjustments to the General Services salaries ordered under the Federal Pay Comparability Act (J.S. 8), and that the amount of each annual adjustment under that Act "is governed by standards expressly set forth in the Act." (J.S. 9.) *See generally, National Treasury Employees v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974). Appellant was a Member of Congress at the time the Adjustment Act adopting such a statutory scheme for ascertaining Congressional pay was enacted. Appellant, therefore, had the opportunity to vote, and did vote (121 CONG. REC. H7858 (daily ed. Jul. 30, 1975)) with respect to the statute which ascertained adjustments to Congressional salaries pursuant to specific statutory standards.

Thus, appellant was not prevented from voting to perform his legislative duty to ascertain Congressional salaries, as he alleges. Nor was the "efficacy" of his vote impaired so as to injure him when Congressional salaries were adjusted thereafter in October 1975, pursuant to such statutory standards, as the district court incorrectly concluded. In focusing its attention on the fact that the Congressional salary adjustments previously authorized became effective without a further vote, the district court failed to recognize that appellant could not have suffered an actual injury by this event. The salaries were adjusted at that time pursuant to express statutory standards. These standards had already been determined to be adequate in a case in which the court noted that by adopting them, Congress had "departed from the previously established Congressional pattern of dealing ad hoc with federal pay adjustments from time to time and provided a mechanism

pursuant to which pay rates for federal employees are adjusted by the President based upon a survey conducted by the Bureau of Labor Statistics in October of each year." *National Treasury Employees v. Nixon, supra,* 492 F.2d at 592. Furthermore, appellant voted on the statute which adopted such standards as the statutory scheme for ascertaining Congressional salaries. Thus, appellant could not have been injured and the efficacy of his vote could not have been impaired merely by the adjustment of the salaries. Furthermore, the statutory scheme for determining Congressional salaries upon which appellant voted was found to be constitutionally permissible by the district court. The district court erred, therefore, in concluding that appellant acquired standing by reason of the October 1975 adjustment in Congressional salaries.

Finally, appellant's disagreement with a statutory scheme adopted by Congress does not provide him with the requisite standing to challenge the statute in his capacity as a Congressman. *Holtzman v. Schlesinger,* 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974); *Korioth v. Briscoe,* 523 F.2d 1271 (5th Cir. 1975); *Harrington v. Bush,* ___ F.2d ___, No. 75-1862 (D.C. Cir. Feb. 18, 1977); *Harrington v. Schlesinger,* 528 F.2d 455 (4th Cir. 1975). *Compare, Coleman v. Miller,* 307 U.S. 433 (1939); *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974). Furthermore, the statutes attacked by appellant specifically provide that Congress may establish other rates of compensation by statute or that the President's recommendations can be disapproved in whole or in part by the action of "at least one House of Congress," and they also provide that the role of the President is limited to making recommendations in the budget submitted by him to the Congress.

Since appellant is a Member of the House of Representatives, he was not, and is not, denied the right to introduce legislation which would specifically disapprove of all or part of the President's recommendations. Appellant admits that he never has introduced a bill or resolution to establish rates of compensation different from those recommended by the President or to disapprove all or any part of such recommendations. See Plaintiff's Answers to Defendant's First Interrogatories (hereafter "Answers"), No. 7. His constitutional right as a Member of Congress is, therefore, preserved to him even if not exercised by him. His success in exercising his right, should he introduce such a bill or resolution, is dependent upon his ability to attract the support of other Members of Congress for his position.

Appellant also admits that he has had the opportunity to vote as a Member of the House of Representatives on legislation proposed pursuant to 2 U.S.C. § 359(1)(A) or (B) (the Salary Act) and has co-sponsored a bill to repeal the statutes he attacks (Answers 4, 5, 6, 9 and 10). Thus, appellant also concedes that he has not been deprived of his right to introduce legislation to repeal the statutes about which he complains.

Under these circumstances, appellant does not have the "personal stake in the outcome of the controversy" and requisite injury necessary to meet the requirements of Article III in order to bring this appeal. *See Baker v. Carr*, 369 U.S. 186, 204 (1962).

II. THE ISSUE PRESENTED BY APPELLANT IS A NONJUSTICIABLE POLITICAL QUESTION.

The standing and political question doctrines are both facets of the broader concept of justiciability. Either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974). One of the tests for determining the presence of a political question is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr, supra*, 369 U.S. at 217. Article I, Section 6 of the Constitution demonstrates that the issue of Congressional compensation is committed by the Constitution to the Congress itself. The constitutional debates cited by appellant (J.S. 14-15) clearly confirm the textual commitment of this issue to the legislative branch.

That appellant presents a political question is also apparent from his argument that "[t]he process of raising Congressional salaries was frequently politically embarrassing to the members involved, but that embarrassment was merely a manifestation of the public accountability that Article I, Section 6, intended," and his argument that Congressional salaries should not be "intertwined" with executive and judicial salaries. (J.S. 20.) It is apparent, as well, from appellant's entire argument that his claim raises important questions of public policy from an "economic standpoint," a "government planning standpoint," and a "social policy standpoint." (J.S. 21-22.) By their very description, such matters are political questions within the province of the

Congress. The inclusion among them by appellant of the "legislative veto" procedure is clearly correct.[5]

Finally, appellant argues that his claim, if sustained, would restore public accountability with respect to Congressional salaries that Article I, Section 6 of the Constitution intended. (J.S. 22.) Again, this is a matter for Congress to resolve because it is textually committed by the Constitution to the Congress. Therefore, even appellant's arguments clearly suggest that this Court should dismiss this appeal on the ground that it raises a nonjusticiable political question.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT CONGRESS VALIDLY EXERCISED ITS BROAD DISCRETION IN THE SELECTION OF THE SCHEME FOR ASCERTAINING CONGRESSIONAL COMPENSATION AND NO SUBSTANTIAL QUESTION IS PRESENTED BY THIS APPEAL.

A. Appellant's Interpretation of Article I, Section 6, Is Incorrect and Is Not Supported by Prior Decisions, the Constitutional Debates or Previous Congressional Conduct.

The three-judge district court correctly rejected appellant's narrow interpretation of the phrase "ascertained by

[5] The doctrines of justiciability, especially those of standing, ripeness and political question, may well preclude any federal court from resolving the political as well as legal problems raised by the constitutional challenges that have been made to the "legislative veto" procedure. *See, e.g.*, Clark v. Valeo, D.C. Cir. No. 76-1825, now pending before this Court as No. 76-1105, in which the Court of Appeals for the District of Columbia Circuit instructed the district court to dismiss the case on grounds of unripeness and judicial prudence, without deciding such other justiciability issues as the standing and political question doctrines or reaching the constitutional challenge. In two other actions in which such challenges have been made in the context of the Salary Act, the courts are confronted with serious issues of justiciability that have yet to be resolved. Atkins v. United States, Nos. 41-76, 132-76, 357-76 (Ct. Cl.); McCorkle v. United States, E.D. Va., *appeal docketed*, No. 76-1479 (4th Cir.).

Law" in Article I, Section 6 of the Constitution. The Constitution expressly vests in Congress the power to ascertain its compensation, Article I, Section 6. The Constitution also provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Article I, Section 8.

Even the constitutional debates quoted by appellant (J.S. 14-15) reveal that various proposals for the ascertainment of Congressional compensation were considered and rejected and the issue ultimately resolved by placing the decision as to its pay in the discretion of Congress with public accountability as the check upon Congress' exercise of its broad discretion. And since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) it has been established that the necessary and proper clause allows Congress such discretion with respect to the means by which the powers the Constitution confers on Congress are to be carried into execution, that all means which are appropriate and plainly adapted to that end, and are not prohibited, are constitutional, if the end is legitimate and within the scope of the Constitution. *Id.* at 421. Further, Congress is not confined to those single means without which the end would be entirely unattainable, *Id.* at 414, but may use its best judgment in the selection of measures, *Id.* at 420.

The only two cases cited by appellant for this point do not even suggest that the provisions involved in the statutes in question are not valid. Indeed, as this Court held in *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), cited by appellant, the constitutional requirement that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress does not require that the Act of Congress specify the precise uses to which the appropriated money is to be put. And, it was the *absence*

of a statute vesting the appointment of inferior officers in the courts of law which concerned the district court in *Cain v. United States,* 73 F. Supp. 1019, 1021 (N.D. Ill. 1947), rather than the power of Congress to adopt such a statute. Thus, *Cain* does not support appellant where Congress *has enacted* a statute, as in this case. *See Surowitz v. United States,* 80 F. Supp. 716 (S.D.N.Y. 1948), in which the statute authorized heads of departments to appoint such numbers of employees of the various classes recognized by statute as may be appropriated for by Congress.

Furthermore, if appellant's interpretation were to be adopted, the Congress could no longer appropriate such amounts of money from the Treasury "as may be necessary" to pay claims against the Federal Government ascertained by the courts and certified by the Comptroller General,[6] nor could Congress continue to authorize by law the President and the heads of departments and agencies to appoint or shift in salary levels such inferior officers as they think proper when they consider such action necessary, subject to such restrictions as Congress may impose. *See, e.g.,* 5 U.S.C. § 5317, which authorizes the President to place up to 34 individuals in levels IV and V of the Executive Schedule.

Thus, at best, the fact that early Congresses established rates of Congressional pay in terms of precise dollar amounts represents only one means of implementing Congress'

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6 "There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, *such sums as may* on and after July 27, 1956, *be necessary* for the payment, not otherwise provide [sic] for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements . . . ." 31 U.S.C. § 724a (emphasis supplied).

power to make laws necessary and proper for carrying into execution its power to ascertain its compensation. The discretion to select other statutory schemes to carry into execution that power clearly rests with the Congress under the necessary and proper clause, Article I, Section 6. *McCulloch v. Maryland, supra,* 17 U.S. at 421; *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution").

B. The Reasoning of the District Court On the Merits Is Correct.

None of the five objections appellant makes to the reasoning of the district court go to appellant's argument that Article I, Section 6, requires that Congress determine the precise dollar amount of its compensation. Instead, appellant objects to the conclusions of the district court that (1) when Congress adopted the 1967 Salary Act and the 1975 Adjustment Act, it acted "by law"; (2) that the statutory procedures in question resulted in an ascertainment "by law"; (3) that Congress, under Article I, Section 9, can limit the uses which may be made of appropriated monies; (4) that the interests of the Congress were represented on the Commission because the Speaker of the House and the President of the Senate each appoint two members to the Commission established by the Salary Act; and (5) that the Constitution is not to be parsed in the narrow, rigid manner of a statute, but must remain flexible and adaptable, placing reliance upon checks and balances built into our tripartite format and the sound attitude of voters expressed at the polls.

Of these five objections raised by appellant, three – the fact that Congress acted by law when it adopted the Salary Act and the Adjustment Act, the composition of the Commission established to make recommendations with respect to congressional, judicial and executive pay, and the need that the Constitution not be parsed in the narrow, rigid manner of a statute – on their face do not present substantial questions for review at this time.

In attacking the district court's suggestion that Congress has broad powers over the use of public monies under the appropriations clause, Article I, Section 9, which may be used to achieve substantive results, appellant overlooks the fact that Congress exercised its power under that clause to end the war in Viet Nam,[7] to prohibit the Civil Service Commission from determining the regulations and procedures governing the recruitment and examination of applicants for attorney positions under the Civil Service classifications,[8] and even to deny Members of Congress and the others covered by the 1975 Adjustment Act the pay increase they would otherwise have been entitled to under that Act in 1976. 122 CONG. REC. H9370-75 (daily ed. Sept. 1, 1976) (J.S. 7a).

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7 "None of the funds herein appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Viet Nam, South Viet Nam, Laos or Cambodia." Act of Feb. 9, 1976, Pub. L. No. 94-212, § 738, 90 Stat. 175.

8 "No part of the appropriation herein made to the Civil Service Commission shall be available for the salaries and expenses of the Legal Examining Unit of the Commission, established pursuant to Executive Order 9358 of July 1, 1943, or any successor unit of like purpose." Independent Agencies Appropriations Act, 1977, Pub. L. No. 94-363, Title IV, 90 Stat. 969.

Appellant's remaining objection is his dispute with the statutory schemes selected by Congress for the Salary Act and the Adjustment Act pursuant to its broad discretion under the necessary and proper clause, Article I, Section 8. Appellant appears to complain that Congress retained no power under the Adjustment Act to veto or approve salary increases. (J.S. 17.) With respect to the Salary Act, appellant complains that the Congress retained only a veto power over pay recommendations by the President. (J.S. 16.) Appellant overlooks the fact that such salary adjustments were under statutory schemes approved by affirmative acts of Congress, and that one type of adjustment was governed by express statutory standards and the other by a provision that when the President submits recommendations to Congress, either House of Congress, acting alone, can by negative vote prevent the recommendations from taking effect. The district court correctly concluded that neither of these statutory schemes "insofar as they govern the ascertainment of congressional compensation contravene the Constitution" (J.S. App. 8a).

Given the discretion reposed in Congress by the necessary and proper clause, Article I, Section 8, neither such contentions of appellant, nor his contentions that such a statutory scheme in the Salary Act "gives the American voters no record of where their Senators and Representatives stood" (J.S. 17), that normal parliamentary process cannot take place in a 30-day period (J.S. 17), and that consideration of Congressional salaries becomes confused with conflicting considerations regarding salaries for other officials (J.S. 17), warrant plenary consideration by this Court. It is a matter of public record that Senators and Representatives took particular care to make known to the American voters where they stood on pay increases

under both the Salary Act and the Adjustment Act,[9] that an amendment to the Adjustment Act rejecting a pay increase in 1977 was introduced, debated and passed in one day by the Senate,[10] and that the relationship between Congressional salaries, judicial salaries and higher-level executive salaries is expressly determined by Congress.

The arguments of appellant that from an economic standpoint a substantial expenditure is involved in the Congressional pay increases authorized by the challenged statutes, that from a governmental standpoint this Court should take this occasion to resolve doubts about the validity of proposed statutory provisions before they are adopted, that from a social policy standpoint Congressional, judicial and high-ranking executive pay should not be considered together, and that it is clear there is a popular belief that Congress is not sufficiently accountable to the public (J.S. 21-22), clearly deal with matters textually committed by the Constitution to Congressional decision. In any event, these arguments in the circumstances of this case do not present substantial questions for review at this time.

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9 *See, e.g.*, 122 CONG. REC. H9365-75 (daily ed. Sept. 1, 1976); 123 CONG. REC. H637 (daily ed., Jan. 31, 1977); 123 CONG. REC. H959 (daily ed. Feb. 8, 1977); 123 CONG. REC. H1021 (daily ed. Feb. 9, 1977); 123 CONG. REC. H1096 (daily ed. Feb. 16, 1977).

10 123 CONG. REC. S3848-51, 3879-80 (daily ed. Mar. 10, 1977).

C. Appellant's Objection to the Statutory Procedures in the Challenged Statutes Could Subvert the Methods of Ascertaining Non-Congressional Salaries Even if He Seeks Only Prospective Relief as to Members of Congress.

The statutory procedures of the statutes challenged by appellant apply to the determination of judicial and higher-level executive compensation as well as to Congressional compensation. The legislative history of both statutes makes it abundantly clear Congress intended to retain full control over such matters and to provide how executive salaries, judicial salaries and legislative salaries should relate to each other. *See* 113 CONG. REC. 36102, 36107-08 (1967); Conf. Rep. No. 1013, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. Code Cong. & Ad. News, 2301, 2304; S. Rep. No. 94-333, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 845, 853.

Thus, appellant is in error in his assertion that his challenge to the procedure for ascertaining Congressional salaries will "not affect the operation of the statutes insofar as non-Congressional salaries are involved." (J.S. 22.) If the statutory procedures challenged by appellant in this case are constitutionally impermissible, they are also invalid for determining higher-level executive and judicial compensation.

IV. THE ISSUE AS TO THE ONE-HOUSE VETO MAY BE MOOT AS TO THE SALARY ACT.

Both appellant and the Members of the United States House of Representatives who have moved for leave to file a joint amici brief in support of appellant[11] complain that the challenged statutory procedure is limited to a power of disapproval which, under the rules of the House and Senate, is difficult to exercise, rather than requiring an affirmative act of approval. (J.S. 16-17) (Amici Brief, 1).

This issue may be moot as to the Salary Act. On April 4, 1977 both the House and Senate adopted a conference report on a bill to extend the Emergency Unemployment Compensation Act of 1974 for an additional year "and for other purposes," and sent the bill to the President. The bill includes an amendment to the Salary Act[12] previously

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[11] We The People, a public interest group, has also moved for leave to file an amicus brief. The arguments in that brief are not specifically addressed herein because We The People limits its presentation "to the public policy, not legal questions involved in this appeal." (We The People Amicus Brief, p. 2.)

[12] The text of the amendment to the Salary Act is as follows:

> "(a) Section 225(i) of Public Law 90-206 is amended to read as follows:
>
> '(i) EFFECTIVE DATE OF AND CONGRESSIONAL APPROVAL OF RECOMMENDATIONS OF THE PRESIDENT.–
>
> '(1) Within sixty calendar days of the submission of the President's recommendations to the Congress, each House shall conduct a separate vote on each of the recommendations of the President with respect to the offices and positions described in subparagraphs (A), (B), (C), and (D) of subsection (f) of this section, and shall

(Continued)

adopted by the Senate by a vote of 82 to 13.[13] The conference report was approved by the House by a vote of 406 to 2, and approved by the Senate by a voice vote.[14]

The amendment specifically requires each House to conduct a separate vote on each of the recommendations of the President with respect to Congressional, judicial and executive salaries within 60 calendar days after they are received and thereby approve or disapprove each of the salary recommendations of the President. The amendment further requires that such votes shall be reported, so as to reflect the

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[12] (Continued)

> thereby approve or disapprove the recommendations of the President regarding each such subparagraph. Such votes shall be recorded so as to reflect the votes of each individual Member thereon. If both Houses approve by majority vote the recommendations pertaining to the offices and positions described in any such subparagraph, the recommendations shall become effective for the offices and positions covered by such subparagraph at the beginning of the first pay period which begins after the thirtieth day following the approval of the recommendation by the second House to approve the recommendation.
>
> '(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a later date than the date on which such recommendations otherwise are to take effect.'.
>
> (b) Section 225(j) of Public Law 90-206 is amended by inserting immediately after 'subsection (b)(2) and (3) of this section shall' the language ', if approved by the Congress as provided in subsection (i),'."

[13] 123 CONG. REC. S5174-77 (daily ed. Mar. 30, 1977).

[14] 123 CONG. REC. H2919, S5515 (daily ed. Apr. 4, 1977).

votes of each individual Member thereon, and that only if both Houses approve by majority vote the recommendations pertaining to such salaries, shall such recommendations become effective.

This action confirms the responsiveness of Congress not only to those proposals of its members which have acquired sufficient support, but also to the views of their constituents to whom Members of Congress must be responsive under our system of government. It also lends force to the argument that this appeal presents what is inherently a political question. See Argument II, pp. 11-12.

CONCLUSION

For the reasons stated above, appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully requests that this Court either dismiss the appeal or, alternatively, affirm the decision of the district court on the merits.

Respectfully submitted,

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Dated: April 6, 1977